Edward Bourne & al. Plaintiffs.
Philip Hunt, Defendant.

In a Writ of Error in Parliament.

THomas *Gwillym*, Tenant in taile of Lands in antient Demeſne, levies a Fine in the Court of the Mannor of *Wormelow* in *Com. Heref.* to Three Conuzees, and thereby acknowledges the Lands in queſtion to be the Right of one, as what he and the other two Conuzees had of the Gift of Tenant in taile, and then Tenant in taile and his Wife releaſe to all the Conuzees for their 3 lives, rendring 6 *l. per annum* Rent to the Tenant in taile and his heirs — Afterwards the Tenant in taile levies another Fine *Sur Conuzance de droit &c.* with Warranty, To the uſe of himſelf and his Heirs — and afterwards in conſideration of 100 *l.* ſells the Lands to *Thomas Paine* (under whom the Defendants in the Action, who are now Plaintiffs in the Writ of Error, claim,) and his Heirs, and dyed in 1663. — The Purchaſer and his Heirs conſtantly received the Rent until the death of the laſt of the three Lives, which hapned in 1693. — And then the Leſſor of the Plaintiff in the Action (who is Iſſue in Taile) of *Thomas Gwillym*, entred and brought this Action, and recovered Judgment in the *Common Pleas*, which has ſince been affirmed in the *Queens Bench*.

☞ Note, The Plaintiffs in the Writ of Error's Anceſtors appear to be Purchaſers in 1648. for valuable Conſiderations, and have been 55 years in poſſeſſion of the Rent reſerved.

The Queſtions are,

I. Whether the firſt Fine levied by the Tenant in taile in ancient Demeſne works a Diſcontinuance? for if not, then the Plaintiffs Title of Entry commencing above 20 years before, his Entry is barr'd by the Statute of Limitations.

II. Whether the Diſcontinuance (if any) wrought thereby determined with the Eſtate for three Lives granted by that Fine, — or ſtill continues to bar the Entry of the Iſſue in Taile, — either by means of that Fine, — or the ſecond Fine with Warranty, — or any other Conveyance in the Cauſe.

III. Whether (though in the other Two points the Law ſhould be in his favour, yet) in reſpect that the Plaintiff lapſed his 20 years given him by the ſaid Statute to bring his *Formedon*, and ſo was barred of his right of Action, — if for that reaſon he was not alſo barred of his Right of Entry.

1. It is conceived, (1.) That a Court of antient Demeſne has no power to take a Fine, being diſabled by the Statute of 18 *Edw.* I. which enacts, that no Fine ſhall be levied without Writ original, and this before the Juſtices of the *Common Pleas* or in *Eyre*, and not elſewhere; and this Statute being penn'd in the negative, will prevail againſt any Cuſtom pretended or found to ſupport ſuch Fines; and being general, will prevent the power of that Court to take a Fine to any effect whatſoever. (2.) If ſuch a Court as this could take Fines by virtue of a Cuſtom, yet this particular Fine is not levied purſuant to the Cuſtom, becauſe it does not appear to be founded on a Writ of *Right Cloſe*, which Writ is as a Commiſſion neceſſary to authorize the Lord to take the Fine, and by the Cuſtom of this Mannor is found by the Special Verdict to be neceſſary, and if the Court had no Juriſdiction to take a Fine, or if the Cuſtom of the Mannor was not purſued, the Fine is void, and can never work a Diſcontinuance. (3.) The Reaſon given by the Lord *Coke* in his 1. *Inſt.* 333. why any Fine works a Diſcontinuance is that it is a Feofment of Record, but this Fine can't be ſaid to be in the nature of ſuch a Feofment, becauſe levied in a Court which is not a Court of Record, and not being within the Reaſon, ought not to be within the Rule of other Fines of Record which do diſcontinue Eſtates; and for this and other reaſons, If here be no diſcontinuance, the Conſequence is (as aforeſaid) that the Right of Entry of the Iſſue in Taile commenced immediately upon the death of the Tenant in Taile, who dyed in 1663. above 20 years before the Iſſue entred, and ſo this Entry is barred by the Stat. of Limitations.

2. The Plaintiff in Error inſiſts, That the Diſcontinuance (if any) did not determine with the Eſtate for three Lives, but ſtill continues to bar the Entry of the Iſſue in Taile by the Common Law. (1.) Becauſe a Fee paſſes by the firſt Fine to the Conuzee by force of the words *Conuzance de droit*, which are ever intended of the Fee, and the words Right and Fee are Sinonymous Terms, as appears by *Lord Coke's* 1 *Inſt.* 345. *b.* and Right is the proper term of Art to carry the Fee in the acknowledgment of a Fine, and conſtantly us'd; and if the Fee paſſes by that Conveyance or Act which originally cauſes the diſcontinuance, the Diſcontinuance muſt be for the whole Fee; and on this account this differs from all the Caſes in *Littleton Sect.* 620. 1, 2. where the firſt Grant paſſed only an Eſtate for Life, and therefore originally made a diſcontinuance only for that Life. (2.) If the firſt Fine alone will not, yet the ſecond Fine and Warranty in this Caſe will work a Diſcontinuance in Fee, that the Warranty may be preſerved, which will be loſt and void if the Iſſue may enter, for then the Conuzee has no opportunity of making uſe of it, and for this reaſon in *Littleton Sect.* 601. *&c.* the Warranty is held to be a diſcontinuance, where the Grant without the Warranty would be none; and the ſame is held in divers other Books in Caſes parallel.

3. The Entry of the Leſſor of the Plaintiff is barred by the Statute of Limitations, which enacts, that no perſon ſhall enter into any Lands but within 20 years after his Right or Title, which ſhall firſt deſcend or accrue. Here the firſt Right or Title that deſcended was a Right of Action, (*viz.*) to a *Formedon* which accrued to the Iſſue immediately upon the death of the Tenant in taile above (35) years ſince, and the Iſſue having neglected for above 20 years to ſue for the Eſtate, is thereby barred not only of his Action, but his Entry alſo. — Otherwiſe a man might enter into Lands when he has no way by Law to recover them, but has loſt that remedy by his own default, which would be abſurd and inconvenient in regard to Purchaſers, and the diſturbance of long Poſſeſſors. — In the Caſe of *Saul* and *Clarke* in *Jones* 208, 'tis adjudged where Tenant in Taile, leaſed for Life, and afterwards granted the Reverſion by Fine, and dyed without Iſſue, and he in Reverſion did not bring his *Formedon* in (5) years as he might, That he could not enter after the death of the Leſſee for life, though then the Diſcontinuance determined as here, becauſe the Reverſioner had but one right, though ſeveral remedies, and having pretermitted the firſt is foreclоſed of the ſecond by the Statute, which is inſiſted to be a Caſe in point.

And for theſe and other Reaſons 'tis humbly prayed that the Judgments given below may be reverſed.

T. Parker.